

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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VICKI WEST and WENDY FEGUNDES,
individually and on behalf of
all others similarly situated,

NO. CIV. S-04-0438 WBS GGH

Plaintiffs,
v.

ORDER RE: PARTIAL SUMMARY
JUDGMENT

CIRCLE K STORES, INC., a
foreign corporation,

Defendant.

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Plaintiffs Vicki West and Wendy Fegundes seek to bring
a class action suit against defendant Circle K Stores, Inc. for
alleged violations of the California Labor Code, Cal. Lab. Code
§§ 226.7, 227.3, and the California Business and Professions
Code, Cal. Bus. & Prof. Code §§ 17200-17210. Presently before
the court is defendant's motion for partial summary judgment.

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1 I. Factual and Procedural Background

2 On March 3, 2004, plaintiffs filed a class action
3 complaint claiming that defendant failed to pay (1) overtime
4 wages, (2) administrative leave wages, and (3) accrued but unused
5 vacation wages, all in violation of state law. (Compl. ¶ 17.)
6 On May 6, 2005, a related state court action in the Superior
7 Court of California in and for the County of Orange approved a
8 settlement between defendant and management (non-hourly)
9 employees. (Jones Decl. in Supp. of Mot. to Amend ¶ 6; id. Ex. B
10 (state court order granting final approval); id. Ex. C
11 (stipulation and release).) Consequently, plaintiffs sought
12 leave to amend their complaint, which was granted in part. (July
13 15, 2005 Order at 2-3.)

14 The amendments approved by the court dropped some of
15 the claims of one proposed subclass (managers) because these
16 claims were resolved by the state court action. (Id. at 3-4.)
17 In addition, the amended complaint added Wendy Fegundes as a
18 named plaintiff representing an additional subclass of employees
19 claiming that defendant failed to pay meal and break wages. (Id.
20 at 4.) In light of these amendments, the court reopened pre-
21 certification discovery regarding the new subclass only. (Id. at
22 8.) The court also extended the deadline for plaintiffs' motion
23 for certification until March 20, 2006. (Id.)

24 Hoping to "streamline the certification hearing,"
25 defendant now moves for partial summary judgment on three
26 supposedly "straight-forward legal issues." (Def.'s Mem. of P. &
27 A. in Supp. of Mot. for Partial Summ. J. 1-2.) First, defendant
28 asks the court to determine, as a matter of law, the appropriate

1 statute of limitations for a claim under Cal. Lab. Code § 226.7
2 (describing the consequences for employers who fail to provide
3 legally mandated meal and rest breaks for hourly employees).
4 Second, defendant argues that plaintiffs do not have a cause of
5 action under California's Unfair Competition Law ("UCL"), Cal.
6 Bus. & Prof. Code § 17203, for failure to provide required meal
7 and rest breaks (claim three). Finally, defendant seeks a
8 judicial determination that it is not liable for the practices at
9 up to 104 Circle K stores that, as of sometime in 2003, are
10 allegedly no longer under defendant's control.

11 II. Discussion

12 Summary judgment is proper "if the pleadings,
13 depositions, answers to interrogatories, and admissions on file,
14 together with the affidavits, if any, show that there is no
15 genuine issue as to any material fact and that the moving party
16 is entitled to judgment as a matter of law." Fed. R. Civ. P.
17 56(c). However, in a Rule 23 class action such as this, where
18 the district court must rule on the issue of class certification
19 "[a]s soon as practicable after the commencement of [the]
20 action," the court must not prematurely grant such a motion.
21 Fed. R. Civ. P. 23. Significantly, the Ninth Circuit has limited
22 early resolution of a motion for summary judgment in a potential
23 Rule 23 class action to cases where granting the motion "seems
24 likely to protect both the parties and the court from needless
25 and costly further litigation."¹ Wright v. Schock, 742 F.2d 541,

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27 ¹ Pre-certification summary judgment is often
28 inappropriate because "the relative merits of the underlying
dispute are to have no impact upon the determination of the

1 544 (9th Cir. 1984). "Under the proper circumstances--where it
2 is more practicable to do so and where the parties will not
3 suffer significant prejudice--the district court has discretion
4 to rule on a motion for summary judgment before it decides the
5 certification issue." Id. at 543-44.

6 A. Statute of Limitations Under Cal. Lab. Code § 226.7 and
7 Cal. Bus. & Prof. Code § 17203

8 Defendant seeks partial summary judgment to establish
9 the statute of limitations under California Labor Code § 226.7,
10 which requires employers to pay employees "one additional hour of
11 pay at the employee's regular rate of compensation for each work
12 day that [a] meal or rest period[, as required by subsection a,]
13 is not provided." Cal. Lab. Code § 226.7(b). Resolution of this
14 issue turns on whether the "additional hour of pay" constitutes a
15 penalty or a wage. If the language of § 226.7 is interpreted as
16 imposing a penalty against employers for failure to provide
17 legally mandated breaks, the applicable statute is only one year.
18 See Cal. Civ. Proc. Code § 340(a); Murphy v. Kenneth Cole Prods.,
19 Inc., 134 Cal. App. 4th 728, 751 (2005). In contrast, if the
20 statute provides a wage payment to the wronged employee, a three
21 year statute of limitations applies. See Nat'l Steel &
22 Shipbuilding Co. v. Superior Court, No. D046692, 2006 WL 147520,
23 at *7 (Cal. App. Jan. 20, 2006) (applying the three year statute

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25 propriety of the class action." Thompson v. County of Medina, 29
26 F.3d 238, 241 (6th Cir. 1994) (quoting Marx v. Centran Corp.,
747 F.2d 1536, 1552 (6th Cir. 1984)). Additionally, "it is
27 preferable to review a motion for class certification first
[because] a quick disposition on the merits is often not
28 possible." Chavez v. Ill. State Police, 251 F.3d 612, 630 (7th
Cir. 2001).

1 of limitations for "[a]n action upon a liability created by
 2 statute, other than a penalty or forfeiture," Cal. Civ. Proc.
 3 Code § 338(a)).

4 Relatedly, defendant also argues that plaintiffs' claim
 5 under the UCL for restitution with respect to wrongfully denied
 6 break times likewise hinges on whether the provisions in § 226.7
 7 award a wage or a penalty. Cal. Bus. & Prof. Code § 17203. The
 8 UCL offers a substantial, four year statute of limitations. Cal.
 9 Bus. & Prof. Code § 17208; Cortez v. Purolator Air Filtration
 10 Prods. Co., 23 Cal.4th 163, 173 (2000). However, plaintiffs can
 11 recover only restitution, not damages, under that statute, a bar
 12 that they concede forecloses an award of penalties. Korea Supply
 13 Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144 (2003); see
 14 also Tomlinson v. Indymac Bank, F.S.B., 359 F. Supp. 2d 891, 895-
 15 96 (C.D. Cal. 2005). Consequently, resolution of the
 16 penalty/wage issue in defendant's favor could eliminate
 17 plaintiffs' UCL claim based on denied break times, and thereby
 18 also restrict the relevant time period for plaintiffs' claims.

19 Section 226.7 has very recently been interpreted
 20 differently by several California appellate courts, with some
 21 courts classifying the payment owed as a penalty and others
 22 disagreeing with this characterization.² Compare Nat'l Steel,
 23 2006 WL 147520, at *7 (Fourth District) (applying the three year
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25 ² Additionally, the Amicus Brief submitted by the
 26 California Teamster Public Affairs Counsel and the California
 27 Conference Board of the Amalgamated Transit Union in National
 28 Steel identified several cases being actively litigated in the
 state trial courts that have all raised the same question:
 whether the monetary award under § 226.7 is a restitutionary wage
 or a penalty. (See Jones Decl. Ex. B at 1-2.).

1 statute of limitations from Cal. Civ. Proc. Code § 338 because
2 "the payment of section 226.7 is an obligation created by
3 statute, other than a penalty"), with Murphy, 134 Cal. App. 4th
4 at 751 (First District) (applying the one year statute of
5 limitations from Cal. Civ. Proc. Code § 340(a) because "a statute
6 like section 226.7 that imposes a payment without regard to the
7 actual loss suffered, is in the nature of a penalty") and Mills
8 v. Superior Court, No. B184760, 2006 WL 198588, at *6 (Cal. App.
9 Jan. 27, 2006) (Second District) ("[W]e read section 226.7 as
10 imposing a penalty on employers who fail to ensure mandated break
11 periods are provided to their employees."). A petition for
12 review of the Murphy decision, filed on January 11, 2006, is
13 currently pending before the California Supreme Court. Defendant
14 thus asks the court to add to a growing and divergent set of
15 opinions involving a complicated interpretation of state law.

16 Applying Wright, the court is convinced that
17 defendant's motion for summary judgment is premature. Ruling on
18 this motion now would not save the court or the parties from the
19 costs of further litigation. See Wright, 742 F.2d 544. Rather,
20 it would simply potentially limit the size of the class³ that
21 will receive notice if the court grants plaintiffs' upcoming
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25 ³ Defendant contended at oral argument that if the court
26 holds that the award under § 226.7 is a wage rather than a
27 penalty, the size of the potential class will triple or
28 quadruple. Defendant's argument assumes, without support, that
its payroll turns over completely on an annual basis. Although a
longer statute of limitations in this case may increase
plaintiffs' damages, the scope of the class requiring
notification will not necessarily grow at the same rate.

1 motion for class certification.⁴ As plaintiff noted at oral
2 argument, if it should turn out that this court is wrong in
3 limiting the relevant time period to one year, expanding the
4 class after Rule 23 litigation is already underway would be both
5 time consuming and expensive in terms of delay and disruption.
6 In contrast, trimming an overly broad class in the event that the
7 California Supreme Court determines that § 226.7 awards a penalty
8 and not a wage would be a relatively simple task. Consequently,
9 granting defendant's motion might result in significant and
10 costly delay if the court wrongly anticipates the California
11 Supreme Court's take on this matter. See Sims Snowboards, Inc.
12 v. Kelly, 863 F.2d 643, 647 (9th Cir. 1988) (holding that, when
13 jurisdiction is based on diversity, a federal court is "in
14 effect, only another court of the State [and] it cannot afford
15 recovery if the right to recover is made unavailable by the
16 State"). Because the relevant state law is in flux, this is not
17 a situation where judicial economy can be served by deciding
18 defendant's summary judgment motion before the certification
19 issue.

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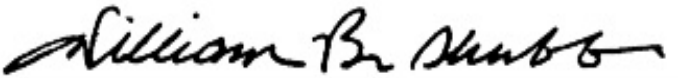
23 ⁴ Significantly, defendant denies that it "failed to
24 provide and/or pay for meal and break periods." (See First Am.
25 Compl. ¶ 9; Answer to First Am. Compl ¶ 6.) Consequently,
26 deciding this issue now, assuming defendant is even found liable,
27 will at best only impact defendant's damages; it will not resolve
28 liability issues and it will not narrow the issues presented by
the case. See Trull v. Lason Sys., Inc., 982 F. Supp. 600, 603
(N.D. Ill. 1997) (implying that the rule allowing courts to
decide summary judgment motions first is limited to situations
where the motion argues that "the plaintiffs' claims are without
merit").

1 III. Conclusion

2 Defendant's motion for partial summary judgment is
3 premature and seeks the court's opinion on matters related only
4 to the scope of its damages. Such motions should not be heard
5 before plaintiffs' motion for class certification.

6 IT IS THEREFORE ORDERED that defendant's motion for
7 partial summary judgment be, and the same hereby is, DENIED.

8 DATED: February 14, 2006

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11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
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